July 14, 2000

By e-mail

Donna M. Caton
Chief Clerk
Illinois Commerce Commission
527 East Capitol Avenue
P.O. Box 19280
Springfield, Illinois 62794-9280

Re: Illinois Commerce Commission Docket 00-0394

Dear Ms. Caton:

Enclosed for filing with the Commission, please find the Initial Brief of the City of Chicago in the above-referenced docket.

Thank you for your assistance in this matter.

Sincerely yours,

Conrad R. Reddick
Special Deputy Corporation Counsel
30 North LaSalle Street, Suite 1040
Chicago, Illinois 60602
(312) 744-5738

encl.
cc (w/ encl.): attached service list

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS COMMERCE COMMISSION On its own Motion v. Commonwealth Edison Company Proceeding pursuant to Section 16-111(g) of the the Public Utilities Act concerning proposed transfer of generating assets and wholesale marketing business and entry into related agreements	)	**Docket Nos. 00-0394/00-0369 (consol.)**

INITIAL BRIEF OF THE CITY OF CHICAGO

Pursuant to Section 200.800 of the Rules of Practice[1] of the Illinois Commerce Commission ("Commission") and the schedule set at hearing on June 29, 2000, the CITY OF CHICAGO ("City") by its attorney, Mara S. Georges, Corporation Counsel, submits its Initial Brief in this proceeding.

SUMMARY

The refund mandates of Section 8-508.1 of the Public Utilities Act ("PUA" or "Act")[2] (and the absence of record evidence of any offsetting financial effects) establish that Edison will likely qualify for a rate increase request under the provisions of Section 16-111(d)[3] during the mandatory transition period if the Notice assets are transferred as proposed. Accordingly, under Section 16-111(g), the Commission may decline to approve the transfer of Edison's nuclear plants described in the utility's Notice.

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1 83 Ill. Adm. Code Part 200.

2 220 ILCS 5/1-101 *et seq*.

3 Unless otherwise noted, all section references are to the Public Utilities Act.

To avoid misinterpretations of the Commission's decision respecting Edison's Notice -- misinterpretations attributable to inconsistent testimony from Edison about the relief the Company is seeking and the ambiguity of the Notice, the Commission must expressly limit its order in this proceeding. The Commission should state explicitly and unambiguously that its order in this case decides only the Section16-111(g) issues that parties were permitted (at least in part) to examine during hearings. The Commission must expressly decline to rule on relief Edison purports not to seek or other matters parties were not permitted to explore. Specifically, the Commission must declare that an order in this case not be construed as (a) approval of substantive provisions of the proposed agreements attached to Edison's Notice or (b) a determination of Edison's rights or obligations respecting decommissioning costs, except as necessary to decide the issues in this case.

A series of rulings by the hearing examiners in this proceeding have denied the Commission a full and fair record of relevant evidence. The improper legal argument admitted as the testimony of Edison witness Manshio should be stricken from the record. The prejudicial effect of rulings from the bench that denied or severely compromised the City's right to cross-examine witnesses on issues central to this proceeding should be rectified. Any lack of evidence attributable to those rulings that is germane to the Commission's decision in this case must be corrected -- expeditiously, because of the statutory deadline -- by reopening the record for additional cross-examination.

INTRODUCTION

On May 22, 2000 Commonwealth Edison Company ("Edison") filed a Notice of Transfer of Assets and Wholesale Marketing Business ("Notice"). The Notice incorporated numerous documents and described a proposed transaction between Edison and a yet to be formed affiliate designated Exelon Genco ("Genco"). As proposed, the transaction would transfer all of Edison's nuclear plants and certain additional assets and liabilities to Genco. Section 16-111(g) authorizes the Commission to hold hearings on the Notice for the purpose of determining whether, if the transaction goes forward, Edison (a) will be unable to provide its tariffed services reliably or (b) is likely to qualify for a rate increase request pursuant to Section 16-111(d) during the mandatory transition period. The Commission initiated the hearing process on June 1, 2000. It must now determine whether either of the statutory test conditions will result from the proposed transaction.

In its Notice, Edison asserted that neither circumstance will follow the proposed transaction and asked that the Commission allow the transaction "to go forward [without hearings] on the terms and conditions described in the Notice and in the accompanying exhibits." Notice at 15 (emphasis added). The City demonstrates in this brief that the proposed transaction will result in at least one of the conditions defined in Section 16-111(g) -- qualification for a base rate increase request.

Edison's Notice asks only that the transaction be allowed to proceed without hearings. It does not define the relief Edison seeks if (as happened) contrary to the Notice's request, the Commission ordered and conducted hearings. At hearing, Edison's witnesses testified inconsistently about whether the relief the utility seeks includes Commission sanction of the terms and conditions of Edison's proposed transfer agreements. The Commission should expressly

declare the limited effect of its determinations in this proceeding to eliminate any uncertainty created by the shifting requests for relief of Edison's Notice and testimony.

The hearings in this proceedings failed to produce a record as complete and fair as the Commission's Rules of Practice contemplate. The City demonstrates the error of certain evidentiary rulings and asks for specific corrective action.

ARGUMENT

Under the PUA, the Commission may, after hearings, prohibit a proposed asset transfer

> if it makes either or both of the following findings: (1) that the proposed transaction will render the electric utility unable to provide its tariffed services in a safe and reliable manner, or (2) that there is a strong likelihood that consummation of the proposed transaction will result in the electric utility being entitled to request an increase in its base rates during the mandatory transition period pursuant to subsection (d) of this Section. 220 ILCS 5/16-111(g).

The evidence of record provides a sufficient basis for the Commission to prohibit the proposed transaction.

A. The PUA's Refund Requirements Establish A Strong Likelihood That Edison Will Be Entitled To Request A Rate Increase During the Mandatory Transition Period.

In connection with its enactment of ratepayer funding requirements to pay for decommissioning nuclear plants owned by Illinois utilities, the Illinois legislature also put in place a series of ratepayer protections. *See*, 220 ILCS 5/8-508.1. Among those protections were directives that monies paid into the decommissioning funds be refunded to ratepayers under certain defined conditions, including the sale or other disposition of plants for which ratepayers

have provided decommissioning funds. The refund requirement applicable to transfers of nuclear plants that yield a reduction in decommissioning liability for the utility makes it likely that Edison will qualify for a rate increase request during the mandatory transition period.

1. Statutory Refund Requirements Will Apply To The Proposed Transaction, Adversely Affecting Edison's ROE In The Section16-111(d) Analysis

Section 8-508.1(3) of the Act provides:

> The following restrictions shall apply in regard to administration of each decommissioning trust:
>
> * * *
>
> (ii) Any assets in a nuclear decommissioning trust that exceed the amount necessary to pay the nuclear decommissioning costs of the nuclear power plant for which the decommissioning fund was established shall be refunded to the public utility that established the fund for the purpose of refunds or credits, as soon as practicable, to the utility's customers.
>
> (iii) In the event a public utility sells or otherwise disposes of its direct ownership interest, or any part thereof, in a nuclear power plant with respect to which a nuclear decommissioning fund has been established, the assets of the fund shall be distributed to the public utility to the extent of the reductions in its liability for future decommissioning after taking into account the liabilities of the public utility for future decommissioning of such nuclear power plant and the liabilities that have been assumed by another entity. The public utility shall, as soon as practicable, provide refunds or credits to its customers representing the full amount of the reductions in its liability for future decommissioning.

These obligations are statutory. They cannot be changed by private agreements between Edison and its anticipated corporate affiliate.[4] Moreover, Edison's witness Mr. McDonald -- who provided the verification of Edison's Notice -- testified that the proposed agreements attached to

[4] Indeed, the legislature created a "true-up" ratepayer refund requirement that would apply specifically in the case of a plant transfer. In addition to being contrary to constitutional requirements for the amendment or repeal of state laws, it simply would not be reasonable to suggest that the legislature intended this statutory ratepayer protections could be entirely nullified by the terms of private transfer agreements.

the Notice were not intended to modify the requirements of state law. Tr. 42. Thus, it is clear that the refund obligations imposed by Section 8-508.1 -- the same statutory provision that authorized Edison's collection of decommissioning charges -- will not be affected by the proposed transaction.

The provision most relevant here, Section 8-508.1(c)(iii) of the Act, explicitly mandates an immediate refund to ratepayers in the event of a disposition of nuclear plants with decommissioning trusts. "In the event a public utility sells or otherwise disposes of its direct ownership interest . . . in a nuclear power plant . . . the assets of the fund shall be distributed to the public utility to the extent of the reductions in its liability for future decommissioning." The same section also requires that: "The public utility shall, as soon as practicable, provide refunds or credits to its customers representing the full amount of the reductions in its liability for future decommissioning." 220 ILCS 5/8-508.1(c)(iii). The triggers for this statutory refund obligation are established by the evidence of record.

2. The Proposed Transaction Will Trigger the Statutory "True-Up" Refund

(a) Disposition of Assets

First, it is undisputed that, as the Notice states, under the proposed transaction Edison will " transfer to an affiliate . . . all of its nuclear generating assets." Notice at 1. Thus, Edison, in statutory language, will "dispose[] of its direct ownership interest . . . in a nuclear power plant." 220 ILCS 5/8-508.1(c)(iii). The proposed transfer of Edison's interests in its nuclear plants was confirmed by the testimony of Edison witnesses McDonald and Berdelle. Edison Exh. 1 at L148-153; Tr. 84.

(b) Reduction in Liability for Future Decommissioning

Second, the factual circumstances defined by the proposed agreements attached to Edison's Notice include a dramatic reduction in Edison's liability for future decommissioning.

The proposed Contribution Agreement requires that Genco (the transferee) "shall assume and be responsible for . . . decommissioning the Stations, relieving Edison of its current liability for future decommissioning." Notice, App. A (Contrib. Agr. §§2.3 and 2.3(c)) (emphasis added). Computations based on the factual assertions in this record demonstrate that, as a result of the proposed transaction, Edison's liability for decommissioning costs would be reduced by several billion dollars.

Mr. Berdelle, Edison's Comptroller, testified in response to questions from the bench (a) that its "current decommissioning liability is roughly $5.6 billion" and (b) that its nuclear decommissioning trusts currently contain approximately $ 2.5 billion. Tr. 101. Under the transaction described in Edison's Notice, the "roughly a $3 billion shortfall in adequate funding of decommissioning" will be assumed by and become the responsibility of Genco. Tr. 101; Notice, App. A (Contrib. Agr. §§2.3 and 2.4). That transfer of liability for future decommissioning funding demonstrates both the fact and the amount of the reduction in liability for future decommissioning Edison will enjoy. That amount is greater than the $2.5 billion refund amount that Edison witness Berdelle acknowledged would adversely affect Edison's rate of return (ROE) calculation under PUA Section16-111(d). Tr. 161.

(c) Absence of Counterbalancing Effects on the ROE Analysis

Finally, the record in this case contains no evidence of financial arrangements or circumstances that would counterbalance the adverse ROE effect of the statutory requirement that Edison "as soon as practicable, provide refunds or credits to its customers representing the full amount of the reductions in its liability for future decommissioning." 220 ILCS 5/8-508.1(c)(iii).

(d) The Impact of the Refund Requirement

Both Edison and the Commission Staff presented rate of return analyses that purport to assess whether the proposed transaction will result in the electric utility being entitled to request

an increase in its base rates during the mandatory transition period pursuant to the ROE test of Section16-111(d). Notice, App. F (Berdelle), Staff Exh. 2 (Hardis).; 220 ILCS 5/16-111(g). Both conclude that the ROE condition for a rate increase request is not met. However, neither Staff's nor Edison's ROE analysis reflects any consideration of the significant refunds required under Section 8-508.1 of the PUA. Tr. 152, 173.

Edison's analysis of its financial condition after the transaction did not include a single scenario that evaluated the effect of statutory refunds paid to ratepayers as the PUA requires. Tr. 152. That statutory obligation was ignored despite (a) the plain refund requirement of PUA Section 8-508.1(c)(iii), (b) the triggering conditions produced by Edison's transfer of its nuclear plant ownership interests and decommissioning liability, and (c) the potential impact of the statutory refund on Edison's ROE within the transition period. The same flaw exists in each of the analyses that purport to find that Edison will not qualify for a rate increase request during the transition period. Tr. 152, 173.

The cross-examination of Mr. Berdelle, coupled with the averments of Edison's Notice, confirm that the proposed transaction will produce the necessary triggering conditions for the statutory refund obligation of Section 8-508.1(c)(iii). Edison will transfer its ownership interest in the nuclear plants. As proposed, that transfer will result in a reduction of Edison's liability for future decommissioning, activating the statutory "true-up" refund. From Mr. Berdelle's testimony, it appears the reduction in Edison's liability will be about $3 billion. Tr. 101. In response to questions from the Hearing Examiners, Mr. Berdelle admitted that a refund of a smaller amount ($2.5 billion) would adversely affect Edison's ROE calculation for purposes of the Section 16-111(d) analysis. Tr. 161.

As a matter of mathematics and law, "there is a strong likelihood that consummation of the proposed transaction" and the refund it will trigger will provide a basis for a rate increase

request under PUA Section 16-111(d). A refund amounting to roughly one-third of Edison's annual revenues, made "as soon as practicable" as the Act requires, will significantly and adversely affect Edison's ROE during the mandatory transition period.[5] Since the Commission must give effect to the express refund provisions of Section 8-508.1 of the Act, the Commission must find that there is a strong likelihood that Edison will be eligible to request an increase in its base rates during the mandatory transition period.[6]

B. The Commission's Order Must State Explicitly And Unambiguously That The Ruling Does Not Approve Or Disapprove Edison's Proposed Agreements

The City is concerned that the Commission's decision in this case might (a) be misconstrued as granting relief based on Edison's ambiguous or conflicting representations of what is being requested or (b) a determination of the lawfulness or the appropriateness of certain aspects of Edison's proposed transaction that were not fully explored in this record. Any such Commission decision would be unlawful, and wholly inconsistent with bench rulings that restricted cross-examination. 220 ILCS 5-10-201(e). Such unexamined, but troublesome, aspects of Edison's proposed arrangement include contract provisions that would have Edison collect decommissioning costs from Illinois delivery service ratepayers for payment over to Genco

[5] Mr. Berdelle's testimony that there would be no adverse effect from statutory refunds was based on his assumption that refunds would be made only under Section 8-508.1(c)(ii), which concerns refunds when the decommissioning funds exceed the costs of decommissioning, and on Edison's expectation that the fund assets will never exceed costs. *See*, Tr. 153,154,157. A refund under Section 8-508.1(c)(iii) requires a refund based on the reduction in utility decommissioning liability, at the time of a transfer of nuclear plant ownership interests. Mr. Berdelle later acknowledged that an immediate refund of $2.5 billion could adversely affect Edison's ROE. Tr. 161.

[6] Despite its clear relevance, rulings by the Hearing Examiners denied the City an opportunity to cross-examine witnesses further on this issue. *See, e.g.*, Tr.. 39, 40, 176, 177. The issue at hand is not whether prices under Edison's Purchased Power Agreement will increase as a result of the proposed transaction (*see Tr. 38-39, 103)*, but whether Edison will qualify to seek an increase in its tariffed base rates.

-- when both the plants and the new plant owner are beyond the ambit of the PUA and the Commission‘s jurisdiction -- and transfer the assets of the PUA’s statutory decommissioning trusts to a non-utility.

The Commission’s order in this case must explicitly and unambiguously declare that the decision addresses only the Section16-111(g) issues the parties were permitted (for the most part) to examine during hearings. In particular, the Commission must assure that the order can in no way be construed as an approval of the substantive terms of Edison’s proposed agreements, or a determination of Edison’s rights or obligations respecting decommissioning costs, except as necessary to decide the issues in this case.

1. The Relief Edison Seeks Is Not Clearly Defined.

Edison’s Notice asked that the Commission forego hearings and let its proposed transaction go forward. The Notice does not define the relief Edison sought seeks if the Commission denied that request, as it did when it initiated this proceeding. The assertions of Edison’s witnesses on this point are not consistent.

Mr. McDonald, Edison’s project manager for its pending merger activities, testified that Edison seeks only a finding that the statutory bases for prohibiting the transaction are not supported by the evidence of record. Tr. 24. Mr. Berdelle, Edison’s Comptroller, testified at one point that the documents attached to the Notice were provided merely to define factual premises for the Commission’s evaluation, and not for Commission sanction. Tr. 151. At another point, however, Mr. Berdelle testified that authorization to transfer nuclear trust fund assets was a part of this proceeding, without a separate petition. Tr. 109-110. [Mr. Manshio (a retained Edison witness) took a very expansive view of the Commission’s action in this proceeding, testifying that a Commission decision not to prohibit the transfer “means that the Commission has

approved the transaction, and whatever is included within that transaction." Tr. 198 (emphasis added).][7]

Despite the ambiguity of the Notice and the conflicting testimony of Edison's own witnesses, through their rulings during the hearings in this case, the Hearing Examiners restricted the City's efforts to define more precisely the relief Edison seeks in this proceeding. The Hearing Examiners ruled that the scope of relief would be defined by the Notice and, on that basis, curtailed the City's exploration of this issue. *See*, Tr. 29-35 and 113-114. The Examiner ruled "I think it is a waste of time to ask this witness what he believes ComEd is seeking because ComEd is seeking what's set forth in their pleadings. . . . So I'm going to preclude any further questions of this witness on that point" Tr. 113-114. But, as noted earlier, Edison's Notice does not define the relief the Company seeks after hearings.

2. Edison's Contract and Funding Proposals Were Not Examined In This Record.

In any case, the substance of the proposed agreements appended to Edison's filed Notice were not examined on this record, providing no basis for Commission sanction or disapproval. The Commission must, therefore, assure that its order in this proceeding does not apply to, and cannot be misinterpreted as applying to, issues not examined on the record. Similarly, the lawfulness and appropriateness of Edison's proposed funding scheme for decommissioning costs was not examined on this record and cannot be determined in this proceeding.

[7] Because of the peculiar restrictions imposed by the Hearing Examiners on the City and other parties challenging the admissibility of Mr. Manshio's testimony, the City has denoted all references to that testimony by the use of [brackets], so that it can be considered only if the testimony is not stricken, but not deemed to be a waiver of the City's rights to argue the inadmissibility of the testimony. *See*, argument on those rulings at C. *infra*.

In summary, the Commission's decision should state expressly that it does not constitute approval or disapproval of the terms and conditions of its proposed agreements with Genco, including its proposed decommissioning funding arrangements. This should not be a matter contested by Edison, since it takes the position -- both in the argument of counsel and in sworn testimony -- that the Commission is without authority to act on any matter other than the statutory issues of PUA Section16-111(g). [Edison Exh. 2 at 10]; Tr. 27, 36. Whatever the Commission's conclusions respecting Edison's ability to provide service or the likelihood of Edison being entitled to request an increase in base rates after the proposed transaction, the Commission's Order should expressly limit the scope and effect of the ruling to those issues identified in Section16-111(g) or other issues necessary to their resolution.

C. The Examiners' Rulings Denied the City An Opportunity to Cross-Examine On Critical Issues and Denied the Commission a Full, Fair and Complete Record.

Before evidence on results of the proposed transaction could be fully developed through cross-examination, the Hearing Examiners erroneously foreclosed inquiry into the effect, under Sections 16-111(d) and (g) of the Act, of decommissioning cost refunds required by PUA. The issue is clearly relevant, since no valid assessment of the likelihood that Edison will be entitled to request an increase in its base rates can be performed without considering the effect of refunds required by the PUA. Although full development of the record was precluded, there is, nevertheless, substantial evidence of record that "consummation of the proposed transaction will result in the electric utility being entitled to request an increase in its base rates during the mandatory transition period pursuant to subsection [16-111](d)." 220 ILCS 5/16-111(g).

1. The Testimony of Edison Witness Manshio Should Be Stricken.

The substantive portions of the pre-filed testimony of Edison witness Calvin Manshio consists entirely of improper legal argument and should be stricken from the record. Indeed, Mr. Manshio announces the purpose of his testimony as follows:

> While ComEd has no reason to believe that the Commission is not aware of its authority under Section 16-111(g) and the broad intent of the legislature, my testimony in this regard is being provided to ensure that the record in this case is clear as to the extent of that authority and intent. Edison Exh. 2 at 3.

He also refers specifically to his discussion of "how the Customer Choice Act focused the scope of the Commission's review" and his construction of "Section 16-111(g)." Edison Exh. 2 at 3.

At one point in the proceedings, the Hearing Examiners (without objection) terminated the City's cross-examination of Mr. Manshio about the import of a Commission action under Section 16-111(g) because:

> "These aren't proper questions. Okay? He can tell you what he thinks. All right? But it really doesn't bind me. . . . The fact that Mr. Manshio feels this may or may not be true doesn't bind me in any way. . . . It's strictly advisory at this point." Tr. 205-206.

The City does not disagree. However, Mr. Manshio's pre-filed opinion testimony also does not bind the Commission, is simply "what he thinks" on legal issues, and is "strictly advisory." Improper questions and other procedural conundrums are unavoidable once such legal opinion testimony is admitted.

It is "black letter law" that "courts do not permit opinion on a question of law," unless the issue concerns a question of foreign law." McCormick on Evidence, Cleary, E. (Gen. Editor), 1972 at 28. This rule has been confirmed by the Illinois courts. Magee v. Huppin-Fleck, 279 Ill. App 3d 81 at 86. Mr. Manshio's testimony offers no facts from his first hand knowledge. He does not draw on his experience as a commissioner to offer testimony about his observations of

past or traditional Commission practice. The remarks he offers about Commission practice are drawn entirely from his construction of statutory provisions and interpretations of case law. Such testimony is patently improper under the governing Illinois rules of evidence.

Permitting such testimony is also inconsistent with the goals of the governing Rules of Practice and would constitute bad regulatory policy. The "principal goal of the hearing process is to assemble a complete factual record." 83 Ill. Adm. Code 200.20(a). In that process, parties appearing before the Commission "must be treated fairly." 83 Ill. Adm. Code 200.20(b).

Loading the evidentiary record with legal opinion would also undermine the expedition and cost-effectiveness goals of the Rules of Practice. The time and money consumed by legal opinion testimony that is repeated as legal argument in briefs will also prejudice parties without the resources to address these issues using one or more witnesses for testimony and more attorneys for briefing.

The nature of Mr. Manshio's testimony cannot be seriously disputed; it is legal argument. In the circumstances of this proceeding -- *viz.*, rulings by the Hearing Examiners that forced the City to choose between challenging patently improper testimony and cross-examining the testimony after it was admitted over objection -- fairness demands that the testimony of Mr. Manshio be stricken from the record. *See,* discussion of Hearing Examiners' rulings, *infra.*

2. The City's Right To Cross-Examine Was Unlawfully Restricted.

Administrative proceedings . . . are governed by the fundamental principles and requirements of due process of law. Abrahamson v. Illinois Department of Professional Regulation, 153 Ill. 2d 76, 92 (1992). Cross-examination is an essential element of a party's participation in hearings. "The Administrative Procedure Act governs administrative hearings in contested cases when a state agency is involved. When the Act applies, it expressly provides for

cross-examination of witnesses in situations that call for full adversarial hearings." Van Harken v. City of Chicago, 305 Ill. App. 3d 972, 713 N.E. 2d 754 (1999) (citations omitted). "A fair hearing before an administrative agency includes the opportunity to be heard, the right to cross-examine adverse witnesses, and impartiality in ruling upon the evidence. Van Harken v. City of Chicago at 305 Ill. App. 3d at 983 (citing Lakeland Construction Co. v. Department of Revenue, 62 Ill. App. 3d 1036 (1978)).

Pursuant to its statutory authority, the Commission has ordered hearings (in which the City is a party) to determine whether the results of Edison's proposed transaction satisfy conditions that require the Commission to permit Edison to go forward with the proposal. At various points in the hearings in this proceeding, the City's right to cross-examine witnesses on matters relevant to that determination was improperly curtailed -- or denied outright -- by rulings of the Hearing Examiners, denying the City an opportunity to exercise its due process rights.

(a) *Edison Witness Manshio --*
Motion to Strike Conditioned On Waiver of Right to Cross

The City and the Attorney General moved to strike the filed testimony of Edison's final witness, former ICC commissioner Calvin Manshio. Tr. 183-184. Although argument on the City's motion was not taken by the examiners, the City stated, as one basis for its motion, that the testimony consists almost exclusively of improper legal argument. After declining argument on the motions, the Hearing Examiners admitted the testimony "subject to your objection." Tr. 183. The Hearing Examiners ruled further that the testimony would be admitted "and then it will be given the appropriate weight based on the arguments." This further ruling effectively denied the City's motion to strike -- without ever hearing argument.

After the effective denial of the City's motion to strike, the prejudice to the City and others challenging the admissibility of Mr. Manshio's testimony was compounded when the

Hearing Examiners effectively extinguished the City's right to cross-examination by conditioning its exercise of that right on the City's waiver of its right to challenge the admissibility of Mr. Manshio's testimony. Although parties challenging admission of the Manshio testimony were invited to file objections during briefing (Tr. 184), the Hearing Examiners made it clear that questioning Mr. Manshio about any issue would bar a challenge to that portion of his testimony.[8]

The effect of this series of rulings was that the City was forced to choose between challenging improper testimony or cross-examining testimony "conditionally" admitted. Parties wishing to challenge the testimony were compelled to forego one element of their due process rights to exercise another.

Given the current position of this severely time-limited proceeding, the only fair and effective remedy is to exclude the testimony. The Commission's Rules of Practice require that "Persons appearing in . . . Commission proceedings must be treated fairly." 83 Ill. Adm Code 200.20(b). That principle is sufficiently strong that in extreme circumstances the rules direct its Hearing Examiners to act affirmatively to "negate any disadvantage or prejudice experienced." *Id.* Edison would not be prejudiced by exclusion of the Manshio testimony, since the entirety of the testimony is legal argument that Edison can include in its briefs.

[8] Parties routinely risk revealing, through their questioning, the relevance of evidence that has been admitted conditionally. That is quite a different matter to deny any opportunity to cross unless one's right to a ruling on admissibility is given up. Yet, that is the effect of the Hearing Examiners' presumptive ruling that any area of testimony probed -- no matter how prejudicial, irrelevant or improper -- would be conclusively presumed immune from an admissibility challenge.

(b) *Staff Witness Goldberger --*
All Cross-Examination Denied Preemptively

The City wished to ask Staff's accounting expert Karen Goldberger about the proper accounting for refunds required under PUA Section 8-508.1 and the effect of entries in the relevant accounts on Edison's net income and ROE. Tr. 181. The relevance of this inquiry has been clearly established in a previous section of this brief.

The previous Staff witness, Mr. Hardis, used accounting data to perform the Staff's ROE analysis under Section16-111(d), but Mr. Hardis was unable to answer the City's accounting questions. Tr. 174-176. Specifically, the City inquired whether an account involved in his ROE analysis could possibly be affected by an Edison refund. Tr. 174. (Mr. Hardis' area of expertise is as a financial analyst, not accounting. Tr. 176.)

Before the City could ask the same question (or any other question) of Ms. Goldberger -- and without objection from any party -- the Hearing Examiners made the following preemptive ruling.

> First of all, you know what, I'm not going to even let you ask the question because . . what you're really talking about is really speculative, and Commonwealth Edison has already answered that if the deal -- if the refund you're talking about doesn't go through, they're just not going to do the deal, okay?
>
> * * *
>
> But I think Commonwealth Edison has answered the question by saying, if we're required to pay $10 billion, we're not going to do the deal. Tr. 177-178.

The City's inquiry was, to the contrary, neither speculative nor answered by Edison's possible future business decision.

The question before the Commission is not whether the statutory refund obligation will, in fact, produce accounting entries that affect Edison's ROE -- a result Edison can avoid by "not doing the deal." The statutory analysis required by PUA Section16-111(g) and defined by

Section 16-111(d) must assume that the deal is done. The question put before the Commission by Section16-111(g) is whether "consummation of the proposed transaction" will result in the electric utility being entitled to request an increase in its base rates during the mandatory transition period. The answer to that question is not affected by Edison's possible reaction to its refund obligations. The question is not (as the Hearing Examiners' ruling suggests) whether Edison's ROE will actually be changed in the future by its refund obligations. Under the Act, if the results of the transaction -- consummated and implemented as proposed -- will permit Edison to request an increase in base rates, the statutory test is satisfied and the Commission may prohibit the transaction.[9]

If the Commission determines that the record evidence on this issue is insufficient to find that Edison will qualify to request a base rate increase, the record should be re-opened expeditiously to permit additional questioning, rectifying the effects of the Hearing Examiners' erroneous ruling.

[9] Whether Edison believes a refund obligation makes the cost of the proposed transfer too high is irrelevant. If a refund or some other aspect of the proposed transaction means there is a strong likelihood that Edison will qualify to request a base rate increase, the statutory questions is answered, whether or not Edison might ultimately abandon the proposed transaction.

CONCLUSION

On the basis of the evidence of record and for the reasons discussed above in this brief, the City asks that the Commission find (a) that there is a strong likelihood that if the proposed transaction is consummated Edison will be entitled to request an increase in its base rates and (b) that, therefore, the Commission may prohibit the proposed transaction. The Commission should also incorporate in its order an express statement of the limited effect of its findings, and, except to the extent necessary to its decisions here, its legal conclusions in this proceeding. Finally, the Commission should strike the improper legal opinion testimony of Edison witness Manshio and re-open the record expeditiously to complete the record in the areas discussed in this brief.

Dated: July 14, 2000

Respectfully submitted,

City of Chicago
Mara S. Georges
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STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On its own motion	)	
v.	)	Docket 00-0394
Commonwealth Edison Company	)	
Proceeding pursuant to Section 16-111(g) of the Public Utilities Act concerning the proposed transfer of generating assets wholesale marketing businesses and entry into related agreements.	)	

NOTICE OF FILING

To: Attached Service List

Please take notice that on this date I caused to be sent to Donna M. Caton, Chief Clerk, Illinois Commerce Commission, 527 East Capitol Avenue, P.O. Box 19280, Springfield, Illinois 62794-9280, by e-mail, the Initial Brief of the City of Chicago in the above-captioned docket.

Dated: July 14, 2000

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STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS COMMERCE COMMISSION On its own Motion v. Commonwealth Edison Company Proceeding pursuant to Section 16-111(g) of the the Public Utilities Act concerning proposed transfer of generating assets and wholesale marketing business and entry into related agreements	))))))))	**Docket Nos. 00-0394/00-0369 (consol.)**

CERTIFICATE OF SERVICE

I, CONRAD REDDICK, an attorney, hereby certify that a copy of the **Initial Brief of the City of Chicago** was served upon the parties listed on the attached service list, via electronic mail at the addresses shown.

Dated: July 14, 2000

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